

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:10-CR-42-1-F
No. 4:11-CV-191-F

CODY HARRIS,)	
Petitioner,)	
)	
v.)	<u>ORDER</u>
)	
UNITED STATES OF AMERICA)	
Respondent.)	

This matter is before the court on motion of petitioner, Cody Harris (“Harris”) to vacate set aside or correct his sentence, pursuant to 28 U.S.C. § 2255. The Government has responded and concurs in Harris’s request. This is a “*Simmons*” case.¹

The material details underlying the instant motion are not contested. Harris contends that neither of his two prior North Carolina “felony” convictions constitutes a “felony” for purposes of his felon-in possession conviction under 18 U.S.C. § 922(g) as a result of the *Simmons* decision. The Government specifically concedes that Harris’s prior marijuana conviction alleged in the Indictment as the predicate for the § 922(g) charge (Count Ten) is not a “felony,” as that term was re-interpreted by the Fourth Circuit Court of Appeals in *Simmons*.²

¹ *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011).

² The Government did not mention the prior state *cocaine* conviction noted in the Presentence Report at ¶ 21, that was imposed on January 6, 2010 – the day prior to return of this Indictment on January 7, 2010. The Indictment did not specify that recent conviction as a predicate for the § 922(g) charge.

Because the parties concede and the court finds that Harris's conviction as to Count Ten of the Indictment – felon-in-possession in violation of 18 U.S.C. § 922(g) – must be vacated in light of *Simmons*, it therefore is ORDERED:

- Harris's § 2255 Motion to Vacate, Set Aside or Correct his Conviction and Sentence is ALLOWED as to his conviction of Count Ten and his sentence thereon, for violation of 18 U.S.C. § 922(g);

- Harris's conviction and sentence for violating 18 U.S.C. § 922(g) – Count Ten of the Indictment [DE-1] – are VACATED;

- the United States Probation Office is DIRECTED to prepare and submit a revised Presentence Report in accordance with the provisions of this order, the rules of this court and the ruling in *Simmons*;


- the Clerk of Court is DIRECTED to schedule and notice this matter for a resentencing hearing consistent with the *Simmons* ruling during the term of court beginning on **February 27, 2012**, in **Wilmington, North Carolina**;

- the Government will ensure Harris's transportation and housing as needed for the resentencing hearing;

- *except as ordered herein*, the Judgment [DE-40] entered on November 10, 2010, remains in full force and effect.

SO ORDERED.

This, the 10th day of January, 2012.



JAMES C. FOX
Senior United States District Judge